

Suppley
(R 75-229)
75-114

May 6, 1975

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ARIZONA ATTORNEY GENERAL

Honorable James E. Don
Pinal County Attorney
Pinal County Courthouse
Florence, Arizona

Re: Opinion request from Robert R. Bean, former Pinal
County Attorney (R 75-229).

Dear Mr. Don:

Your predecessor in office recently submitted a request for an Attorney General Opinion. This letter is in response to that request and is submitted to you in your capacity as current Pinal County Attorney.

The question presented was as follows:

"Does the City of Coolidge have jurisdiction to assess a sales tax upon sales made to a school district or to the County of Pinal for sales made by merchants within the City of Coolidge?"

As a prefatory point, it should be noted that the City of Coolidge does not have a true "sales" tax in the sense that the levy of the tax is directly upon the vendee of goods. Rather, that city has enacted an ordinance patterned after the State of Arizona Transaction Privilege Tax Act, A.R.S. §§ 42-1301 et seq. See City of Coolidge Ordinance No. 122, adopted July 16, 1973.

It is clear that such a transaction privilege tax is levied upon persons engaged in numerous enumerated business activities. In short, the legal incidence of the tax falls upon the person engaged in business without regard to whether or not the economic burden of the tax is "passed on" to that person's customers. Tower Plaza Investments, Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973), appeal dismissed 414 U.S. 1118 (1974); City of Phoenix v. Phoenix Newspapers, Inc., 100 Ariz. 189, 412 P.2d 693 (1966); Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1955).

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While it is true that most of the appellate decisions in this area involve cases relating to the state transaction privilege tax, they are nonetheless highly persuasive and indicative of the manner in which the higher courts of the state are likely to rule in cases involving transaction privilege (i.e., excise) taxes imposed by municipal corporations.

The Supreme Court of Arizona stated in Arizona State Tax Commission v. Garrett Corporation, supra, 79 Ariz. at 393:

"Certainly the retailer may not, by adopting a particular form of billing as a business practice, change the fundamental nature of the Act. State Tax Commission v. Quebedeaux Chevrolet, supra [71 Ariz. 280, 226 P.2d 549 (1951)]. The liability for the tax is still the personal liability of the seller. There is no authorization whatsoever to directly shift the tax to the purchaser, nor is the seller made the agent of the state to collect the tax from the purchaser. Consequently we hold that the legal incidence of the tax is still on the person engaging in the business of selling tangible personal property, the retailer, and both in practical and legal effect the tax is upon the person conducting a business and not upon the transaction, the sale."

Moreover, in a case somewhat analogous to the fact situation posed in the instant question, it was held in City of Tempe v. Del E. Webb Corp., 13 Ariz. App. 597, 480 P.2d 18 (1971) that a municipality could validly impose its transaction privilege tax upon an independent contractor even though the contracts were with a state agency for the construction of buildings on the campus of a state university. The court cited with approval the decision in the Garrett case, supra, and expressly overruled the decision to the contrary in Ashton Company v. City of Tucson, 7 Ariz. App. 509, 441 P.2d 275 (1968).

A central aspect of the question here under consideration relates to the "passing on" of the economic burden of the tax. Whether or not a person upon whom the tax is levied by

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the taxing authority can "pass on" the economic burden of his liability is a matter of contractual negotiation between him and his customers. It is not a matter of statutory mandate. See Arizona Attorney General Opinion 63-32.

In an opinion directly related to the question posed, it was specifically opined in Arizona Attorney General Opinion 69-9-L that school districts are not legally liable for state transaction privilege taxes on sales of tangible personal property where the taxes are not a part of the contract price with their vendor. The opinion stands for the proposition that if the economic burden of the vendor's tax is included in the contract price, the vendee would be liable to the vendor under the contract. The vendor, however, always remains liable to the State.

Thus, in the context of the questions posed, it is the opinion of this office that the City of Coolidge transaction privilege tax is levied upon persons engaging in certain enumerated business activities, including sales of tangible personal property. Since it is not levied upon such person's customers (i.e., including school districts and Pinal County), there can be no claim by the customers of tax immunity. The vendee's liability to reimburse the vendor for taxes applicable to the contract depends on the contract's terms. The City of Coolidge must look to the person upon whom the legal incidence of the tax falls rather than the person to whom the economic burden may have been contractually shifted.

Finally, any dispute over the aforesaid contractual shifting of the economic burden of the tax must be resolved between the vendor and his customers. Such dispute and/or its resolution, however, cannot alter the tax liability of the person engaging in the taxable business.

Sincerely,

BRUCE E. BABBITT
Attorney General

/s/ Ian A. Macpherson
IAN A. MACPHERSON
Assistant Attorney General

IAM:lh